

Religious Activities in Public Schools

By Ralph D. Mawdsley

Religious activities in public schools have generated considerable litigation in the past few years. Not only are courts wrestling with the definition of religious free speech rights of teachers and students, but also with whether rights between these two categories can be different. Any differences between teachers and students notwithstanding, one can predict that any effort by public schools to treat teachers or students differently where religious issues are at stake could result in litigation.

The extent to which teachers can engage in religious activities in public schools involves a range of legal issues. Those issues include a teacher's right to free expression, the school district's right to determine curriculum, the state's requirement of compulsory attendance, and the student's perception of religious sponsorship.

The role of teachers as employees of a school district to engage in religious activities, though, may not always be as extensive as those for students. Students enjoy the right under the Equal Access Act to participate in religious clubs on school premises as long as the school permits other non-curricular student-initiated clubs to meet during non-instructional time. When activities under the U.S. Constitution's free speech clause are considered, however, the rights of teachers and students may be more similar.

Free Expression—A Primer on Free Speech Analysis

Forum analysis under the free speech clause has been an inexact and confusing process, in large part because courts have referred to nonpublic fora,¹ public fora,² designated fora,³ limited public fora,⁴ and open fora.⁵ At one

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dimension, a forum is simply a place and free speech rights can be determined by the nature of the place where expressive conduct occurs. Thus, expressive conduct that would be subject to minimal government control in public fora, such as public parks, could possibly be prohibited altogether in a nonpublic forum, such as a public school classroom. However, a forum can also be defined by how it is used and herein lies the major free speech problem for public schools. Public schools that generally could be considered nonpublic fora can lose that characterization if they permit individuals or groups to engage in non-curriculum-related expressive conduct.

As confusing as forum analysis is, the constitutionality of school policies regarding religious activity may not necessarily depend on the nature of the forum. For example, in *Hedges v Wauconda Community Unity School District*,⁶ the Seventh Circuit Court of Appeals held that, even though a public junior high school was a nonpublic forum, a school's rule permitting student distribution of material other than religious material was a violation of free speech. Thus, the concept of forum must be connected with another aspect of free speech.

In *Lamb's Chapel v Center Moriches Union Free School District*,⁷ the U.S. Supreme Court introduced the concept of viewpoint discrimination. In a rare unanimous decision involving the establishment clause, the Court determined that religious speech in public schools had the same protection as other forms of speech. Unfortunately, even with the religious speech protection of *Lamb's Chapel*, the appropriate intersection between forum and viewpoint has been difficult to discern.

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Schools and Curriculum

Forum analysis and free speech rights are not necessarily easy concepts to reconcile. In *Settle v Dickson County School Board*,⁸ the Sixth Circuit held,

1. *Hedges v Wauconda Community School Dist.*, 9 F.3d 1295 (7th Cir. 1993)

2. *Kreisner v City of San Diego*, 1 F.3d 775 (9th Cir. 1993)

3. *Chabad-Lubavitch of Georgia v Miller*, 5 F.3d 1383 (11th Cir. 1993)

4. *Good News/Good Sports Club v School Dist. of Ladue*, 28 F.3d 1501 (8th Cir. 1994)

5. *Harris v Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994)

6. 9 F.3d 1295 (7th Cir. 1993).

7. 508 U.S. 384 (1993)

8. 53 F.3d 152 (6th Cir. 1995)

in part because a classroom was considered a nonpublic forum, that a teacher was justified in denying a student's request to select Jesus Christ as the subject for her biography report. The teacher's refusal to permit a biography on a religious person was upheld even though, arguably, such rejection could have been considered viewpoint discrimination with regard to the student's free speech. However, the court found that whatever free speech rights the student might have in the public schools did not extend to determining the school's curriculum.

With a similar problem of analyzing forum and viewpoint discrimination, but with a different result, the U.S. Supreme Court in *Rosenberger v Rector and Visitors of the University of Virginia*⁹ invalidated the university's refusal to fund a student newspaper that published articles with a religious perspective. For the Court, the kind of forum was irrelevant and the university's refusal where it had funded other student publications written from non-religious perspectives constituted viewpoint discrimination under the free speech clause.

Forum analysis can become a useful concept in prohibiting certain kinds of activity. In *Chandler v James*,¹⁰ a school district could be prohibited from permitting students to use the school intercom for prayer, to distribute Bibles in classes, to lead in prayer in class, or to lead in prayer over the public address system at graduation and athletic games, all of this even though the public address system was used for non-religious communication. Not only were classrooms nonpublic fora but, as long as school officials maintained control over school property, they were ultimately responsible for its use. Similarly, by application, classroom teachers could not escape the imprimatur of the Establishment Clause by permitting students to do in the classroom what they (teachers) could not do directly.

School Curriculum

Not only are religious activities affected by the nature of the forum, they can also be affected by their relationship to the school's curriculum. For example, in *Roberts v Madigan*¹¹ the Tenth Circuit Court of Appeals upheld a reprimand for a fifth-grade teacher for his passive, non-proselytizing religious activities. In *Roberts*, the teacher had read his Bible at his desk during 15 minutes each day when students were engaged in silent reading at their desks. During the rest of the day, the Bible was placed on his desk. For students who had no other reading materials, the teacher had available

9. 515 U.S. 819 (1995).

10. 985 F. Supp. 1068 (M. D. Ala. 1997).

11. 921 F.2d 1047 (10th Cir. 1990).

239 books, among which were two that were clearly religious, *The Bible in Pictures* and *The Life of Jesus*.

The school's principal, following a parent complaint, directed the teacher to remove the Bible from his desk, directed him not to read the Bible in class, and ordered the two religious books to be removed from his classroom bookshelf. In addition, the principal removed a copy of the Bible from the school library. At trial, the principal was ordered to replace the Bible in the library, but the directives concerning the presence of the Bible and religious books in the classroom were upheld.

In upholding the federal district court decision, the Tenth Circuit Court of Appeals differentiated between the curriculum in the classroom and the library. In terms of the classroom, the Tenth Circuit followed a earlier U.S. Supreme Court case, *Hazelwood School District v Kuhlmeier*,¹² where the Court had given considerable latitude, over free speech objections by students, to school administrators in determining and implementing school curriculum. In *Roberts*, the Bible and religious books were not part of the fifth grade curriculum, and thus, were not entitled to free expression protection. As to the library, however, the Tenth Circuit suggested that another Supreme Court decision, *Board of Education v Pico*,¹³ had extended greater protection to libraries (as opposed to classrooms) under the guise of a student's right to receive information.

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Religious Garb and Symbols

Whether the wearing of religious garb or religious symbols can be prohibited by state statute or school district rule has met with different results. In *Cooper v Eugene School District*,¹⁴ the Oregon Supreme Court held that a state statute prohibiting teachers from wearing religious garb did not violate the Free Exercise Clause; however, the Mississippi Supreme Court held in *Mississippi Employment Security Commission v McGlothlin*¹⁵ that a teacher's right to wear a head wrap as part of her religious and cultural heritage constituted free expression under both the federal and state constitutions. To the extent that an attempt to restrict religious garb or symbols represents religious expression, a school can anticipate a legal challenge.¹⁶

12. 484 U.S. 260 (1986).

13. 457 U.S. 853 (1982).

14. 723 P.2d 298 (Ore. 1986).

15. 556 So. 2d 324 (Miss. 1990).

Equality of Treatment

Cases such as *Settle* and *Roberts* raise the larger question as to whether religious activities should be treated equally with other kinds of non-religious activities in which teachers might engage. In *Helland v South Bend Community School Corporation*,¹⁷ the Seventh Circuit Court of Appeals upheld a school district's decision to remove a teacher from its list of permanent substitutes, in part because the teacher had read the Bible aloud to his high school classes and had distributed religious material. Although the high school had other non-religious reasons for taking the teacher's name from the list, the Seventh Circuit indicated that the reason related to religious activities was nondiscriminatory for purposes of a Title VII discrimination claim.

Clearly, the school could have based its decision on its right to control curriculum, but the fact that the court upheld the school's action based on religious activity raises a question as to whether the teacher could have been treated in a similar fashion if he had shared non-religious, political views with his class. As the court observed in *Helland*, a school district has "a constitutional duty to make certain, given the Religion Clauses, that subsidized teachers do not inculcate religion."¹⁸

In *May v Evansville-Vanderburgh School Corporation*,¹⁹ the Seventh Circuit upheld a school board rule prohibiting school employees from using school premises for brief prayer meetings prior to the beginning of the school day. The difficulty with this case was that the school permitted school employees to meet on school premises during free periods to discuss other issues. The result in *May* suggests that, even though the school had created a limited public forum in terms of employee discussion, a school employee desiring to use school facilities for religious purposes might not have the same right to use school premises as those who did not have a religious purpose.

The key aspect of equality in treatment of religious activities in public schools should be the concept of secular counterpart. To the extent that a religious activity has a non-religious, secular counterpart, the religious

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16. See *Cheema v Thompson*, 67 F.3d 883 (9th Cir. 1995) where the court held that a school's enforcement of its weapons ban violated the Religious Freedom Restoration Act in terms of a Sikh student's right to carry a small ceremonial knife.

17. 93 F.3d 327 (7th Cir. 1996).

18. *Id.* at 331, quoting from *Lemon v Kurtzman*, 403 U.S. 602, 619 (1971).

19. 787 F.2d 1105 (7th Cir. 1985).

activity probably should be required, leaving the school with the option of either permitting both kinds of activities or denying permission to both.

Applying secular counterpart to another popular source of litigation though—graduation prayers—presents an interesting result. Does a secular counterpart to a graduation prayer exist? The federal circuits are divided on the question. The Fifth Circuit in *Jones v Clear Creek Independent School District*²⁰ upheld student-initiated graduation prayer, while the Third Circuit in *ACLU v Black Horse Pike Regional Board of Education*²¹ struck down such prayer. The better reasoning appears to have been offered in *Doe v Madison School District*²² where the Ninth Circuit upheld a school policy permitting the top four students, selected on the basis of grades, to deliver a five-minute speech at graduation with religious or non-religious content. To single out graduation prayer for favorable treatment, whether initiated by students or school officials, may be questionable since prayers by themselves have no secular counterpart. Arguably, a graduation speech can be content-neutral; a prayer by its very nature cannot.

Conclusion

Religious activities in public schools have generated considerable litigation in the past few years, much of it in the wake of *Lamb's Chapel*. Combining forum analysis with viewpoint discrimination has not been an easy task for courts. Not only are courts wrestling with the definition of religious free speech rights of teachers and students, but also with whether rights between these two categories can be different. Added to the mix is the Equal Access Act that applies only to students, which automatically ensures that students will have access to school facilities under federal statute that teachers may well not have under either state or federal constitutions. Any differences between teachers and students, notwithstanding, one can predict that any effort by public schools to treat teachers or students differently where religious issues are at stake could result in litigation.~B

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20. 977 F.2d 963 (5th Cir. 1992).

21. 84 F.3d 1471 (3d Cir. 1995).

22. 147 F.3d 832 (9th Cir. 1998).